will admit of such application. *If it be such that the defendant cannot mistake the object of the notice, it will be sufficient.*" Staples, J., speaking for the court in *Board of Supervisors v. Dunn*,' 27 Gratt. on p. 612, citing *Graves v. Webb*, 1 Call, 443; *Seguine v. Auditor*, 4 Munf. 398; *Steptoe v. Auditor*, 3 Rand. 221.

It is plainly implied, however, that the notice under section 3211 of the Code shall be in writing, as otherwise it could not be served, returned, filed, and docketed, as required.

While great indulgence is allowed to the defendant in the way of pleading, as to the plaintiff in respect to the notice, yet, if he desires a jury, an "issue of fact" must first be made up to be thus tried. He can do this by pleading formally according to the course of the common law, which he is allowed to do, or informally by stating in writing the grounds of his defence, treated as a plea or pleas, to which the plaintiff may reply with like informality. In either case, however, an *issue* must be made up in some way on the record, in order to have a trial by jury. *Preston v. Salem Imp. Co.*, Post, p. 447.

Nor can plaintiff or defendant ever be taken by surprise, if the provisions of section 3249 of the Code are availed of. Nothing could be less technical or formal.

In the same line of reform is section 3212 of the Code, which allows the motion to be made "*severally* against each [of the defendants liable, including personal representatives], or *jointly* against *all*, or *jointly* against any *intermediate number*," with a proviso, that "*judgment* against such personal representatives shall, in all cases, be *several*." With the exception of the proviso to the extent stated, the section is the same as the corresponding section of the Code of 1849.

WOOD v. WALKER, TRUSTEE, AND OTHERS.*

Virginia Court of Appeals: At Wytheville.

(July 25, 1895.)

1. CHANCERY PRACTICE—*Bill for specific performance—allegations—tender of deed.* A bill filed by a vendor of real estate against his vendee, to enforce specific execution of the contract for sale, which does not tender a deed of conveyance, and which does not allege the ability and willingness of the vendor to convey a sufficient title, is bad on demurrer. Such bill should allege the facts constituting performance on the part of the vendor, and a sufficient deed of conveyance should be tendered with the bill.

Appeal from a decree of the Circuit Court of Wythe County, rendered March 19, 1892, in a suit in chancery wherein the appellees were the complainants and the appellant was the defendant.

Reversed.

The charges and statements of the bill are fully set forth in the

* Reported by M. P. Burks, State Reporter.

opinion of the court. The agreement referred to in the bill is as follows:

AGREEMENT.

This agreement, made this 27th day of February, 1888, between James A. Walker, trustee for R. R. Moore, and R. R. Moore, of the first part, and Robert Wood, of the second part,

Witnesseth, that the said parties of the first part hereby sell to the said party of the second part two hundred and ten acres of land, for the price of five thousand dollars, for which the said party of the second part has executed his three notes, dated this day, for $1,666.66\frac{2}{3}$, and due the first of January of 1889, 1890 and 1891, with interest from date.

The said land is situate in Wythe county, on the south side of Reed creek, about two miles from the courthouse, adjoining the lands of Floyd Davis, S. R. Sayers, F. Fields, William Brown and brother, and the lands of said R. R. Moore, known as Holland Iron Works land. The said tract being all the remainder of the tract purchased by R. R. Moore, of F. Spiller, which has not heretofore been sold off, supposed to contain about one hundred and seventy-five acres, and the balance of the 210 acres to be taken off the Holland Iron Works land, adjoining the Spiller land, and running about north and south from Crockett's Mill road, to the old town turnpike, so as not to interfere with or include the iron ore bank of R. R. Moore, which is hereby reserved.

And the said R. Wood is to have all the rents of said land due in money or crops on said 210 acres after this day, said Robert Wood is to build the line fence between the two hundred and ten acres and the Holland Works land. Said Wood is to use all the rails now in the fence between the Spiller and Holland lands, and if any new rails are needed they are to be made and put up by said Wood out of timber to be furnished by said Moore along or near the new line.

Witness the following signatures and seals:

JAMES A. WALKER, [Seal.]
R. R. MOORE, [Seal.]
R. R. WOOD. [Seal.]

R. Crockett, for the appellant.

Walker & Caldwell, for the appellees.

CARDWELL, J., delivered the opinion of the court.

This is a suit for the specific performance of a contract for the sale of land. The bill, filed at the second February rules, 1891, alleges, that appellees, "Jas. A. Walker, trustee, under a deed of conveyance of R. R. Moore and R. R. Moore, on the 27th day of February, 1888, sold to appellant, Robert R. Wood, a tract of land containing 210 acres, situate in Wythe county, adjoining Floyd Davis and others, for the purchase price of $5,000, for which Wood executed his three bonds, bearing date on the 27th day of February for $1,666.66 each, and due the first of January, 1889, 1890, and 1891, respectively, with interest

from date;" that the terms of sale were embodied in a written agreement signed by all the parties, which is filed as an exhibit with the bill; that Wood took immediate possession of the land under the sale; and that although all the bonds have fallen due they are only subject to a credit of $3,319.50, as of the 19th day of October, 1890. Averments are then made that nothing further could be realized on the bonds by judgment and execution; that Wood had not paid any taxes on the land; and that plaintiffs' claim constituted a lien on the land. These, briefly stated, are all the allegations or averments of the bill, and the prayer is: "that the land be sold and the proceeds of the sale be applied to the payment of the purchase money, as evidenced by the bonds, and of the taxes, as long as Wood had been in possession of the land," &c.

In addition to those mentioned in the bill, the agreement between the parties contains this further provision· "The said tract being all the remainder of the tract purchased by R. R. Moore of F. Spiller, which has not heretofore been sold off, supposed to contain about 175 acres, and the balance of the 210 acres to be taken off the Holland Iron Works land, adjoining the Spiller land and running about North and South from Crockett's Mill road, to the old turnpike, so as not to interfere with or include the iron bank of R. R. Moore, which is hereby reserved."

At the September term of the Circuit Court, appellant demurred to this bill, because insufficient, and "particularly because no deed of conveyance of the land is exhibited with the bill in compliance with the terms of the contract of sale," and the cause was continued to the March term, 1892, when, without disposing of the demurrer, the court decreed a sale of the land for the payment of the balance of the purchase money.

From this decree an appeal was allowed to this court, and the only question that need be considered is, whether appellant's demurrer to appellees' bill should have been sustained? The contract between the parties, by fair construction, entitled appellant, upon payment of the purchase money, to a deed of conveyance of the land by a sufficient title, defining the metes and bounds of the land, and in particular those of that portion "to be taken off of the Holland Iron Works land" to make up, with remainder of the "Spiller tract," the 210 acres. As we have seen, the bill does not even allege that the appellees had done all that was required of them under the contract, nor their ability and willingness to convey by a sufficient title, the property

which they had agreed to convey, nor that they had tendered a sufficient deed thereto to appellant; in fact no allegations or averments of this character are made in the bill. "One who seeks to compel another to fulfill a contract of purchase is required to plead and prove his ability and willingness to convey by a sufficient title the entire property, which he has agreed to convey, and a tender of a sufficient deed thereto. . . . This deed must be brought into court and the tender of it kept good until the suit has been determined." 22 Amer. & Eng. Ency. of Law, p. p. 1039 and 1040.

"The bill (for specific performance) must show that complainant has done everything necessary to entitle him to performance of the contract by the defendant, and that there is a demand on the other party uncomplied with. The plaintiff should allege the facts constituting performance on his part, so that the court may judge whether he has done what he ought." Waterman on Specific Performance of Contracts 123, 124, and cases cited. The courts in some of the States of the Union have held that a tender of the deed with the bill is not required, but we think the better rule, deducible from the weight of authority is, that complainant be required to allege the facts constituting performance on his part, and tender with his bill a sufficient deed of conveyance of the title of the property he has agreed to sell and convey, that the court may judge whether he has done what he ought, and whether the deed is such a conveyance of the title as the contract requires.

In the case of *Kenny v. Hoffman & als*, 31 Gratt. 442, where the contract provided that Kenny was to pay the purchase money as soon as he got a clear title, and where Hoffman had tendered to the agent or counsel of Kenny a deed which only conveyed "the legal and equitable interests of the grantors in the land, and all those claiming by or through them," and afterwards filed the deed with his bill for specific performance of his contract with Kenny, and in which he averred that he (Hoffman) had done all that was required of him under the contract, this court held that Hoffman was not entitled to the specific performance, as Kenny was entitled to a conveyance not only with general warranty, but under his contract as construed, a title free from encumbrances—"a clear title." See also *Griffin v. Cunningham*, 19 Gratt. 571.

We are of opinion that the appellees in the case here did not, by their bill, make a case that entitled them to the specific performance of their contract with appellant, and that therefore the circuit court erred in

not sustaining the demurrer thereto; and for this error, the decree complained of must be reversed and annulled, but the cause will be remanded to the circuit court with leave to appellees to amend their bill and to have such further proceedings thereon as may be proper, in accordance with this opinion. *Reversed.*

BY THE EDITOR.—It is said in the opinion of the court that, in a suit in equity by the vendor for the specific execution of a contract for the sale of real estate, "Some of the courts of the Union have held that a tender of the deed [of conveyance of the estate] with the bill is not required, but we think the better rule, deducible from the weight of authority, is, that complainant be required to allege the facts constituting performance on his part, and *tender with his bill* a sufficient deed of conveyance of the title of the property he has agreed to sell and convey, that the court may judge whether he has done what he ought, and whether the deed is such a conveyance of the title as the contract calls for."

The court, in reaching this conclusion, seems to have overlooked the case of *Whitten v. Saunders*, 75 Va., in which it was *expressly* decided that *the tender* of a deed by the vendor is unnecessary. On p. 570, Judge Staples, delivering the opinion of the court, says: "It is not necessary, as claimed by the appellant, that a deed conveying the legal title shall be actually executed and tendered or deposited with the papers. The Circuit Court, having all the parties before it, may at the proper time direct the title to be conveyed by one of its commissioners to the purchaser."

It is not remarkable that this case should have escaped the attention of the counsel and the court; for the particular point decided is not stated in the head-notes of the reporter, nor in the index of the volume containing the report of the case. If this case is authority, Virginia is *one* of the States holding "that a tender of the deed with the bill is *not* required." Is this case, under the circumstances, to be considered as overruled by *Wood v. Walker?* The decision in *Whitten v. Saunders* is sustained by abundant authority, as shown by the cases referred to in the notes to 22 Am. & Eng. Encyc. of Law, cited in the opinion of the court. See the notes on p. 1040. Among the numerous cases there cited is *Taverner v. Barrett*, 21 W. Va., wherein that learned and able jurist, Judge Green, on pp. 679–681, discusses the question and reaches the same conclusion with the Virginia Court of Appeals in *Whitten v. Saunders.*

Until the decision in the principal case, the writer had never supposed that a tender of a deed by the vendor complainant was necessary, as a condition precedent, in the absence of a special stipulation to that effect, to entitle him to specific performance of the contract for sale. Certainly, in the courts in which he has practised such has not been the rule. It has been held sufficient that the vendor was able and ready to convey a good title whenever the purchase money was paid.

With deference, we submit that the ruling in the principal case is too rigorous and technical for a court of equity, and should not be followed as a precedent in future. Fortunately for the appellees, the technical objections which prevailed in the Court of Appeals may yet be removed in the further proceedings to be had in the Circuit Court under the terms of the order remanding the cause.